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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-5392

ROBERT HOWE, SR.,
Petitioner,

v.

WILLIAM FRENCH SMITH, ATTORNEY GENERAL
OF THE UNITED STATES, et. al.,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER and BRIEF OF THE KANSAS DEFENDER PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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MOTION TO FILE AMICUS CURIAE BRIEF IN SUPPORT OF PETITIONER

The Kansas Defender Project, by and through counsel, respectfully moves this Court for permission to file a brief amicus curiae in support of the petitioner. Consents to the filing of this brief have been received from the Solicitor General on behalf of the federal respondents and from petitioner. However, the Respondent Cuiros, who intervened in the court below, has refused to grant consent.

The Kansas Defender Project is a clinical law school program in which students assist inmates at the United States Penitentiary in Leavenworth and other institutions. The program was one of the first of its kind in the country, and is at present one of the most extensive legal assistance programs in the nation.

Over the past several years, the Project has assisted a considerable number of state prisoners housed in the Leavenworth penitentiary pursuant to contracts between the state and federal government under 18 U.S.C.

§ 5003. In so doing we have litigated the legality of transfers such as the one in the instant case,* and have assisted state inmates with problems of parole and good time.

The issue here is whether the language of § 5003 limits the Bureau of Prisons' ability to accept state prisoners by requiring that it only accept inmates who are in need of and who will receive rehabilitative treatment. The question is one of Congressional intent, and will necessarily also require analysis of the Government's administrative construction of the statute. Because we have represented a large number of contract prisoners, we have gained a broad knowledge of the actual operation of the Bureau's contract programs. We wish to provide the court with information on the extent of the transfer program, its operation over time, and the effects of out-of-state transfers on

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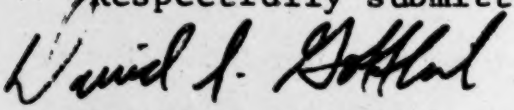
*See Brief of Kansas Defender Project as Amicus Curiae at 2.

state prisoners. Only after considering such information can this Court properly conclude whether the Bureau's construction of the statute effectuates Congressional intent and is entitled to deference. Counsel for Petitioner represents Vermont state prisoners, rather than prisoners in federal institutions; we understand that his brief will not include the kind of information that our longstanding representation of federal prisoners enables us to provide.

A large number of states now contract with the federal government, and the decision of this Court will have a substantial impact on state corrections and state prisoners. That very reason undoubtedly prompted Respondent Cuiros to intervene, and it is expected that other states will file amicus briefs. We request the granting of our motion to enable this court to receive a more complete and balanced picture of the issue.

Respectfully submitted,



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BRIEF OF THE KANSAS DEFENDER PROJECT AS AMICUS CURIAE IN SUPPORT OF PETITIONER

The Kansas Defender Project, by and through counsel, files this brief as amicus curiae in support of the petitioner.

STATEMENT OF INTEREST

The Kansas Defender Project (KDP) is a clinical law program at the University of Kansas School of Law in which students provide legal assistance for inmates at the United States Penitentiary in Leavenworth and Kansas state institutions. The Project, which

began in 1965, is one of the first legal assistance clinics of its kind, and was referred to with approval by Justice Douglas, concurring, in Johnson v. Avery, 393 U.S. 483, 495 (1969). In the past five years alone, the Project has counseled over one thousand Leavenworth inmates, making it one of the most extensive programs of legal assistance for prisoners in the country.

Recently, a number of our cases have involved prisoners incarcerated in Leavenworth pursuant to contracts between the states and the federal government authorized by 18 U.S.C. § 5003.[1] Our efforts have been directed at assisting contract prisoners in dealing with state parole authorities or securing state good-time, as well as in litigating the question of the legality of § 5003 transfers.[2]

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[1] In the past year, we have assisted inmates from Delaware, Washington, New Mexico, Wyoming and Arizona.

[2] Recent caees involving 18 U.S.C. § 5003 in which the KDP has provided assistance for Leavenworth inmates include: Fletcher v. Warden, ___ F.2d ___, Nos. 79-1156, 80-1749 (10th Cir., Feb. 13, 1981); In Re Curtis L. Johnson Personal Restraint Petition, No. 3905-III-6 (Wash. Ct. App. Div. Three, filed Apr. 1,

As a result, we have gained experience with the consequences of transfers under 18 U.S.C. § 5003.

The primary purpose of this amicus curiae brief is to present additional information, based in part on the experience of amicus in representing state prisoners in federal institutions, that will provide the Court a more complete picture of the issues.

A motion to file this brief has been submitted to this Court.

SUMMARY OF ARGUMENT

This case presents the question of whether 18 U.S.C. § 5003 grants the Bureau of Prisons the discretion to accept state prisoners into any of its facilities for any purpose, or whether, on the other hand, the statute limits the Government's discretion by a requirement that state prisoners be transferred only to federal treatment facilities for rehabilitative or medical

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1980); Watson v. Delaware, No. 196, 1979 (Del. Sup. Ct., Oct. 7, 1980).

treatment.

We submit that the latter view is the only sensible construction of the statute. The statutory language contains a requirement that the Bureau of Prisons certify the availability of "treatment facilities" and the House Judiciary Committee Report contains an explicit statement that the use of federal facilities is restricted to those inmates in need of treatment. Congress' use of the term "treatment facilities" in related statutes, particularly the Youth Corrections Act, demonstrates that the term "treatment facility" is not a euphemism for penitentiary and was not included in § 5003 as an oversight. The Justice Department's present belief that it has unlimited discretion is inconsistent with its earlier pronouncements, contrary to Congressional intent, and entitled to no weight.

Adoption of the construction of § 5003 urged by the Government would frustrate the purpose of the statute. While Congress was interested in fostering the treatment

and rehabilitation of state inmates, the Bureau's construction would make rehabilitation more difficult. The transfer of a state inmate to a federal prison, often thousands of miles from his home, may hinder rehabilitation by weakening the communication between the inmate and his family and friends, impairing access to the courts, disrupting education or vocational training and hampering the inmate's parole opportunities.

ARGUMENT

POINT I

ONLY THOSE STATE INMATES IN NEED OF SPECIALIZED TREATMENT AVAILABLE IN THE FEDERAL SYSTEM MAY BE TRANSFERRED TO FEDERAL CUSTODY PURSUANT TO 18 U.S.C. § 5003.

18 U.S.C. § 5003 permits the Attorney General, "when the Director shall certify that proper and adequate treatment facilities and personnel are available," to contract with states for the "custody, care, subsistence, education, treatment and training" of state prisoners. In Lono v. Fenton, 581 F.2d 645

(7th Cir. 1978) (en banc), the Seventh Circuit held that the statute, because of its reference to treatment facilities, authorizes transfers from the state to federal prisons only for some actual treatment need. In the decision below the Second Circuit rejected Lono's rationale, finding that the term "treatment facility" simply named federal prisons in terms of their "most laudable (if, perhaps, least often realized) goal"; that the states were authorized to contract for purposes other than "treatment"; and that the Government's administrative construction must be given deference. Howe v. Civiletti, supra, 625 F.2d at 457-458.[3] We submit that analysis of the history of § 5003 and surrounding legislation demonstrates that the court in Howe was incorrect. "Treatment facilities" are more

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[3]The majority of courts have agreed with Howe in rejecting Lono's interpretation of § 5003. Fletcher v. Warden, ___ F.2d ___, Nos. 79-1156, 79-2062, 80-1749, (10th Cir., Feb. 13, 1981); Beshaw v. Fenton, ___ F.2d ___, No. 79-1777 (3d Cir., Dec. 15, 1980); Sisbarro v. Warden, 592 F.2d 1 (1st Cir.), cert. denied, 444 U.S. 849 (1979).

than euphemisms for prisons, and the court's reliance on the Bureau's construction of the statute is inappropriate.

We begin with the words of the statute itself. 18 U.S.C. § 5003(a) provides:

> The Attorney General, when the Director shall certify that proper and adequate treatment facilities and personnel are available, is hereby authorized to contract with the proper officials of a State or Territory for the custody, care, subsistence, education, treatment, and training of persons convicted of criminal offenses in the courts of such State or Territory: Provided, That any such contract shall provide for reimbursing the United States in full for all costs or other expenses involved.

The statute does not authorize transfers at any time prison space is available--a certification is required that "treatment facilities and personnel" are available. Since the Director must certify that "treatment facilities" are available, it follows, if the act is to have any sense, that the only place a contract prisoner can be

transferred is to a "treatment facility" and that one of the purposes of the transfer must be to provide treatment.

This interpretation is supported by the explicit language of the legislative history of the Act. The bill was first introduced in the Senate, at the request of the Department of Justice. In a letter to the Judiciary Committee, Deputy Attorney General Peyton Ford stated that the legislation was being proposed because:

> Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but not available to the States. These requests usually relate to juveniles, concerning whom many of the States are without satisfactory institutions and training programs.

S. Rep. No. 978, 82nd Cong., 1st Sess. 2 (1951).

The bill passed the Senate[4] and was then

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[4]The bill passed without debate. However, in

referred to the House Judiciary Committee, which recommended passage of the bill in a report that emphasized that the bill's purpose was to make rehabilitative or medical treatment facilities in federal prisons available to state prisoners.

> Frequently, State officials request the Bureau of Prisons to undertake the custody, treatment, and training of State prisoners where specialized types of institutions and training programs are indicated but are not available in the States. These requests usually relate to juveniles and drug addicts, concerning whom many of the States are without satisfactory institutions and training programs. The Bureau of Prisons points out that it now has Federal facilities available, including medical and administrative personnel, to accommodate those State offenders that are in need of the various types of treatment that Federal institutions are providing . . . .

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his very brief remarks on the Bill in the Senate, the Sponsor, Senator McCarran, noted that federal custody could be authorized only "under certain conditions" and "in a limited category of cases." 97 Cong. Rec. 13543 (1951).

H.R. Rep. No. 1663, 82nd Cong., 2d Sess. 1 (1952); 2 U.S. Code Cong. & Admin. News, p. 1421 (1952).

In its summary of the contents of the bill the House Report cited the limited purposes for which transfers could be accomplished, and provided, as well, a definition of treatment:

> The proposed legislation restricts or limits the use of Federal prison facilities to those convicted State offenders who are in need of treatment. The term "treatment" as used in this bill, in addition to its ordinary meaning of providing medical care, is also meant to include corrective and preventive guidance and training as defined in the Youth Corrections Act (sec. 5006 g, title 18, U.S.C.).

H.R. Rep. No. 1663, supra, at 2; 2 U.S. Code Cong. & Admin. News, supra, at 1421.

A comparison between the language of § 5003 and related statutory provisions demonstrates beyond doubt the concrete meaning of the terms "treatment" and "treatment facility." 18 U.S.C. § 5003 appears next

to and was passed less than two years after the Youth Corrections Act (YCA), 18 U.S.C. §§ 5005-5026. Modeled after the English Borstal system, the YCA was designed as "a new alternative sentencing and treatment procedure" for persons under 22. S. Rep. No. 1180, 81st Cong., 1st Sess. 1 (1949). Under § 5010, eligible Youth Offenders may be sentenced for "treatment and supervision" in lieu of ordinary imprisonment. The YCA was created with the aim of rehabilitation rather than retribution. "The underlying theory of the bill is to substitute for retributive punishment methods of training and treatment designed to correct and prevent antisocial tendencies. It departs from the mere punitive ideas of dealing with criminals and looks primarily to the objective idea of rehabilitation." H.R. Rep. No. 2979, 81st Cong., 2nd Sess. 3; 2 U.S. Code Cong. & Admin. News, p. 3982, 3985 (1950). See Dorszynski v. United States, 418 U.S. 424, 434 (1974).

Like commitments under 5003, commitments

under the YCA are to "treatment facilities." 18 U.S.C. § 5012 provides:

> No youth offender shall be committed to the Attorney General under this chapter until the Director shall certify that proper and adequate treatment facilities and personnel have been provided. (Emphasis supplied).

Similarly, the Narcotic Addict Rehabilitation Act, passed after the YCA and § 5003, under which eligible addicts are sentenced to "treatment" (18 U.S.C. § 4253(a)), also contains the requirement that no inmate be committed "if the Attorney General certifies that adequate facilities or personnel for treatment are unavailable . . .".

Thus, contrary to the Second Circuit's position, the term "treatment facility" is not a euphemism. In fact, it has been used in precisely those situations where Congress contemplated a commitment for rehabilitative treatment, as opposed to an ordinary penal commitment.

In contrast, where treatment is not

Congress' principal concern, it has had no difficulty characterizing Bureau of Prisons facilities in terms other than treatment facilities. 18 U.S.C. § 4001 vests control and management of federal "penal and correctional institutions" in the Attorney General. 18 U.S.C. § 4042 provides that the Bureau shall manage all federal "penal and correctional institutions"; § 4081 speaks of the integration of all federal "penal and correctional institutions." See also 18 U.S.C. §§ 4122(b), 4123, (federal prison industries) and 4161 (computation of good time). Further, 18 U.S.C. § 4002 authorizes the Bureau of Prisons to contract with state facilities for the purpose of providing "suitable quarters", not treatment faciltiies, for federal prisoners. See also 18 U.S.C. § 4100-4115 (transfers of inmates to and from foreign countries--treatment used only in reference to juveniles and mentally ill).

The task of this Court in construing § 5003 is to ascertain Congressional intent

and give effect to the legislative will. Philbrook v. Glodgett, 421 U.S. 707, 713 (1975). In so doing, the Court is obliged to give effect, if possible, to every word Congress used. Reiter v. Sonotone Corp., 442 U.S. 330, 339 (1979). Here, the language of the statute, its legislative history and related statutory provisions demonstrate that the term "treatment facility" has a concrete meaning. The conclusion of the Court below that "treatment facility" is but a euphemism for prison is without basis.

The Second Circuit's alternative basis for the conclusion that § 5003 contains no requirement of treatment fares no better. The court relied on the fact that § 5003 authorizes the Bureau to contract for the "custody, subsistence, education, treatment and training" of state offenders as evidence that the statute gives neither primacy to treatment nor provides a basis for concluding that treatment must be furnished.

Again, reference to the Youth Corrections Act demonstrates the weakness of the court's decision; under the YCA the Government may contract with any public or private agency, "for the custody, care, subsistence, education, treatment and training of committed youth offenders . . . ." 18 U.S.C. § 5013. The use of terms other than treatment in § 5013 of the YCA in no way detracts from the requirement that a YCA commitment be to a "treatment facility" and for treatment; rather, it simply reflects the fact that the Bureau in § 1513, like the states in § 5003, must pay for all the aspects of a treatment program, including custody care and subsistence, as well as treatment.

Finally, the court below placed considerable weight on the Bureau of Prisons' present construction of § 5003. While we recognize that, under ordinary circumstances, the construction of a statute by an agency charged with its implementation is entitled to weight, Adamo Wrecking Co. v. United

States, 434 U.S. 275, 287 n. 5, 288 (1978), there are a number of reasons why that doctrine is inapplicable here.

First, it is well settled that the weight accorded an administrative construction depends in part on the contemporaneity of the construction with the enactment of the statute. General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976). Accord, Zuber v. Allen, 396 U.S. 168, 192 (1969). Moreover, a construction will carry the most weight "when the administrators participated in drafting and directly made known their views to Congress in Committee hearings." Id. at 192. Here, Mr. Ford's letter to the Senate Judiciary Committee is the only written record of the Justice Department's contemporaneous views on the meaning of § 5003. As noted, supra at 8, that letter, if it supports any construction of the statute, supports the view that the statute was to be utilized in those cases in which treatment was required.

Second, the weight accorded an

administrative construction depends in large measure on the consistency of the agency interpretation with earlier and later pronouncements, Skidmore v. Swift & Co., 323 U.S. 134, 140 (1944), and the express articulation of the construction by the administrative agency. Investment Co. Institute v. Camp, 401 U.S. 617, 627 (1971). As the majority in Lono pointed out, it was sometime after the statute's adoption that "the Bureau of Prisons began to give it a much broader interpretation." 581 F.2d at 647. Moreover, the Bureau failed in Lono, and has failed since that case, to disclose a single written statement setting forth its broader interpretation of § 5003.[5]

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[5]The only mention of § 5003 in the Department's regulations is made in reference to the duties of the Director of the Bureau of Prisons. The regulation, parroting the statutory language, authorizes the Director to enter:

> . . .[I]nto contracts with State or territorial officials for the custody, care, subsistence, education, treatment, and training of State or territorial prisoners, upon certification with respect to the availability of proper and adequate treatment

In sum, it appears that the Bureau at some undisclosed time simply decided to alter its interpretation of § 5003 to allow it to devote a significant percentage of its maximum security facilities to housing state prisoners, without regard to whether the state inmates needed treatment.[6]

There are limitations on the interpretive roles of administrative agencies that are "grounded in the language, purpose, and

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facilities and personnel, pursuant to section 5003 of Title 18 of the United States Code.

28 C.F.R. § 0.95(g) (1979).

[6]Perhaps the most telling evidence that the Bureau has fashioned an administrative construction of § 5003 of recent vintage to meet its desire to house an increasing number of state prisoners are the statistics reported by the Justice Department concerning admissions to Bureau institutions each year. Published annually in the Department's "Statistical Report" series, the data indicate a 170 percent growth in annual admissions beginning in FY 1976. (See Appendix A.) The figure has undoubtedly increased since FY 1977, since at present there are 836 state prisoners in Bureau of Prisons' institutions. These institutions are divided into six security levels. Of the 836 state contract prisoners in federal custody as of Dec. 31, 1980, 343 resided in the five maximum security penitentiaries that comprise the Level 5 and 6 facilities; another 179 resided in Level 4 facilities. See Bureau of Prisons, I.I.S. Report No. 81.06 (these figures were furnished to petitioner's counsel by the Department of Justice).

history of the particular statute . . . ." Teamsters v. Daniels, 439 U.S. 551, 566 (1979). An agency's administrative construction must be consistent with the Congressional purpose, Morton v. Ruiz, 415 U.S. 199, 237 (1973), and judicial deference to even long-term agency constructions "must be tempered with the caveat that an agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." Federal Maritime Commission v. Seatrain Lines, 411 U.S. 726, 745 (1973). Since the Bureau's present construction of § 5003 violates Congressional intent as well as the Government's earlier view, it is entitled to no weight.

POINT II

THE GOVERNMENT'S INTERPRETATION OF SECTION 5003 FRUSTRATES EFFORTS AT REHABILITATION AND CAUSES HARDSHIP TO INMATES.

The Government's interpretation of Section 5003 is as unfortunate a policy decision as it is an incorrect reading of the statute. Under the present administration of the contract program, the majority of state prisoners are concentrated in the Bureau's most secure facilities;[7] apparently, while in these facilities they are incarcerated under conditions no different from other maximum security and long-term inmates. See Battick v. Stoneman, 421 F. Supp. 213, 225 (D. Vt. 1976). Thus, the present "treatment" of most contract inmates is long-term incarceration in maximum security institutions. State prisoners incarcerated under these conditions suffer the worst of both worlds--while they are subject to substantial deprivations not suffered by the

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[7] See footnote 6, supra, at 18.

inmates incarcerated in home-state prisons, they may be unable to take advantage of benefits available to federal prisoners. As a result, the current administration of § 5003 frustrates, rather than aids, the "treatment" and rehabilitation of state convicts.

Inmates transferred from a state jurisdiction to federal custody suffer a number of special hardships. The transfer to a location far from an inmate's home state will often mean a complete cessation of visits from family and friends. For example, in Lono v. Fenton, supra, the appellant, transferred from Hawaii to the federal penitentiary in Marion, Illinois had not received a visit from his family or friends in over ten years. 581 F.2d at 646. The distance of Lono's separation from his family, and the length of time without a visit is typical, rather than unique for contract prisoners. [8]

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[8] See, e.g., Anthony v. Wilkinson, ___ F.2d ___, No. 79-2362 et. al., (7th Cir., Dec. 23, 1980)

It is universally accepted that the opportunity to visit with family members and maintain family ties may play a crucial part in determining an inmate's chance for rehabilitation. Indeed, the existence of a supportive family relationship is one of the few factors that statistically can be shown to have an effect in combatting recidivism. Uniform Law Commissioners Model Sentencing and Corrections Act, Comment to § 4-116, at 261 (1979); Homer, Inmate-Family Ties: Desirable but Difficult, 43 Fed. Prob. 47 (Mar. 1979). Accordingly, Justices of

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(prisoners from Alaska, Hawaii, Vermont, Delaware, and New Mexico in Marion, Illinois); Tai v. Thompson, 387 F. Supp. 912 (D. Hawaii 1975) (Hawaii prisoners in Atlanta); Fletcher v. Warden, ___ F.2d ___, Nos. 79-1156, 79-2062, 80-1749 (10th Cir., Feb. 13, 1981) (Delaware and Connecticut prisoners in Leavenworth, Kansas); Capitan v. Cupp, 356 F. Supp. 302 (D. Ore. 1972) (Oregon prisoners in Leavenworth). The records office at the federal penitentiary in Leavenworth, Kansas has informed us that the facility presently houses state contract prisoners, inter alia, from Alaska, Hawaii, Maine, Massachusetts, Connecticut, Vermont, Delaware and the Virgin Islands.

this Court,[9] Uniform Law Commissioners,[10] professional organizations of all varieties,[11] and international bodies,[12] have prodded institutions to provide generous opportunities for family visits. As the 1967 Task Force on Corrections stated:

> The task of corrections therefore includes rebuilding solid ties between offender and community, integrating or reintegrating the offender into community life--restoring family ties, obtaining employment and education, securing in the larger sense a plan for the

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[9] E.g., address by Chief Justice Warren Burger, Annual Report to the American Bar Association, Feb. 8, 1981 (Transcript of remarks at 10) (calling for "[g]enerous family visitations in decent surroundings to maintain family ties").

[10] Uniform Law Commissioners, Model Sentencing and Corrections Act, §§ 4-115 & 4-116 (1979).

[11] National Sheriffs' Association, Handbook on Inmates' Legal Rights 42 (1974); Correctional Law Project, American Correctional Association, Model Correctional Rules and Regulations 44-47 (rev. ed. 1979); American Correctional Association, Manual of Correctional Standards 542 (1966).

[12] European Committee on Crime Problem, Standard Minimum Rules for the Treatment of Prisoners, ¶ 37, at 15 (1973).

> offender in the routine functioning of society.

President's Commission on Law Enforcement and the Administration of Justice, Task Force Report: Corrections at 7 (1967). The task of rehabilitating inmates is made immeasurably more difficult when inmates are transferred thousands of miles, as is common in § 5003 cases.

Separation from one's family is not the only hindrance to an inmate's rehabilitative prospects that can occur by reason of a § 5003 transfer. Transfers may result in the interruption of an inmate's education or work programs. See Hoitt v. Vitek, 361 F. Supp. 1238, 1248 (D. N.H.), aff'd sub nom. Laaman v. Vitek, 502 F.2d 1158 (1st Cir. 1973). Even if vocational or educational training is available to the arriving inmate, his incarceration may be prolonged because the state refuses to award good-time credit for the training accomplished out-of-state.[13]

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[13] See DEL. CODE ANN. tit. 11, § 4384 (1980

A transfer from the state to federal system may also impair an inmate's opportunity for parole by effectively foreclosing his ability to appear in person before his state parole board. At present, in 48 of the 50 states, inmates may appear at some point before parole boards for in-person hearings. See V. O'Leary & K. Hanrahan, Parole Systems in the United States 36-38 (3rd ed. 1976).[14] With rare exceptions, the contract inmate will be unable to take advantage of this important opportunity. See Hoitt v. Vitek, supra, 361 F. Supp. at 1249 (a personal appearance is very important; an inmate's inability to be present would likely be detrimental).[15] Moreover, the inmate may

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Supp.) (granting rehabilitative achievement good-time for participation in programs "offered by the Department" of Corrections). We are aware of no instance where such good time has been granted to a Delaware inmate confined out-of-state.

[14] The two states that do not grant inmates a right to appear nevertheless provide their parole boards with the discretion to call for an inmate's appearance. See Parole Systems in the United States, supra, at 31; GA. CODE ANN. § 77-516 (1973); TEX. CODE CRIM PROC. ANN. art. 42.12, § 15(f) (1979).

[15] It appears that the only opportunity for a

find it more difficult to arrange an appropriate release plan if he is several thousand miles from his home.

The distance between the inmate's home state and the federal institution may impair his communication with counsel. See, e.g., Rebideau v. Stoneman, 398 F. Supp. 805, 811 (D. Vt. 1975); Tai v. Thompson, 387 F. Supp. 912, 915-916 (D. Hawaii 1975). For the inmate without counsel, access to the courts will also be impaired. While federal institutions have materials on federal law, they do not ordinarily contain state law materials. See Bureau of Prisons Program

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contract inmate to appear personally before the parole board deciding his fate will take place in the case where a state parole hearing panel visits the federal prison where the inmate is located.

The United States Parole Commission has recently adopted a regulation providing for the holding of "Courtesy Hearings"--hearings where the state inmate appears before members of the United States Parole Commission--in cases where "resources permit" and where the institution is a "substantial distance" from the requesting state. United States Parole Commission Policy and Procedures Memo No. 80/12 (May 1, 1980). Of course, even if a state inmate is able to arrange a courtesy hearing, he will not be heard by the authority with the power to release him.

Statement 1315.3 (July 16, 1979) (Inmate Legal Activities--includes a list of required law library materials); Lono v. Fenton, supra, 581 F.2d at 646 (Hawaii legal materials not available at Marion Penitentiary).

In sum, the transfers of state inmates over long distances and across jurisdictions carry special hardships, and impair the prospects of successful rehabilitation. As one judge has perceptively noted:

> Transfer to a foreign jurisdiction has traditionally been regarded as altogether different [from transfers within a jurisdiction]: to be cast outside the jurisdiction within which one was sentenced is often to be separated from rights and privileges and standards otherwise available--to become, to some degree, a "man without a country".

Gomes v. Travisono, 490 F.2d 1209, 1217 (1st Cir. 1973) (Campbell, J., concurring), vacated, 418 U.S. 909, aff'd as modified, 510 F.2d 537 (1974).

It may well be that the recognition of these hardships could have motivated

Congress to adopt a statute permitting transfers only in those cases where the rehabilitative benefits to be gained from the transfer were substantial. We submit that is precisely the course that Congress chose. Despite the possible cost-effectiveness of renting out maximum security prison space to the states, Congress limited the receipt of state prisoners to "treatment facilities." To read that phrase out of that statute is to permit a perversion of Congress' purpose in enacting it.

CONCLUSION

For the above stated reasons, the judgment of the Court below should be reversed.

Respectfully submitted,

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APPENDIX A

Admissions of State Prisoners to Bureau of Prisons Institutions

For years the Department of Justice has published an annual statistical report detailing the number and characteristics of individuals who have been committed to the custody of the Attorney General of the United States and are held in Bureau of Prisons' institutions. Since FY 1969 the Department has included data in this report without interruption on the admissions of state prisoners to Bureau institutions.

The following table contains data from these reports for those fiscal years. The graph is included to illustrate the trend in state prisoner admissions during that time.

Fiscal Year	Total State Prisoners Admitted
1969	55
1970	68
1971	55
1972	56
1973	69
1974	47*
1975	61*
1976	105
1977	134

Source: FY 1969-FY 1973, U.S. Department of Justice, Federal Bureau of Prisons. "Statistical Reports. Fiscal years 1969, 1970, 1971, 1972, 1973." Table: Other Admissions to Bureau of Prisons Institutions, Excluding Court Commitments. Section B: Admission Tables.

-FY 1974, U.S. Department of Justice, Law Enforcement Assistance Administration; National Criminal Justice Information and Statistics Service, Sourcebook of Criminal Justice Statistics - 1976. Table 6.78,

*Report indicates data 78% complete.

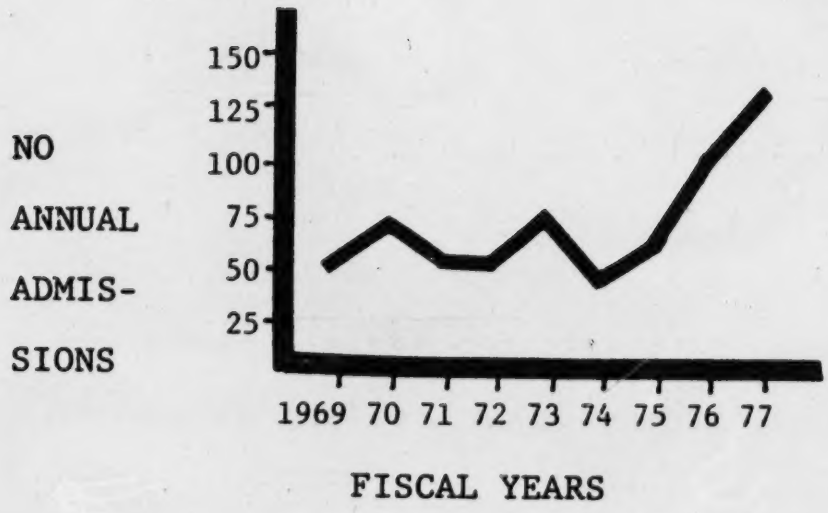
p. 722.

-FY 1975, U.S. Department of Justice, Federal Prison System, "Statistical Report, Fiscal Year 1975." Table B-12-1, p. 78.

-FY 1976, U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, Sourcebook of Criminal Justice Statistics - 1978. Table 6.58, p. 650.

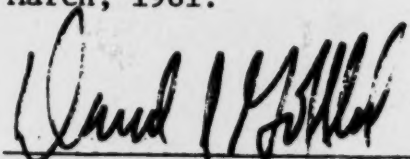
-FY 1977, U.S. Department of Justice, Law Enforcement Assistance Administration, National Criminal Justice Information and Statistics Service, Sourcebook of Criminal Justice Statistics - 1979. Table 6.36, p. 650.

NUMBER OF STATE PRISONERS ADMITTED ANNUALLY TO BUREAU OF PRISONS' INSTITUTIONS, FY 1969 - FY 1977



Counsel wishes to thank Christopher McKenzie, Steven Zinn, Wendy Watts-Johnson, and Richard Hodson for their help in the preparation of this brief.

I, David J. Gottlieb, a member of the bar, hereby certify that three copies of this motion and brief were served upon the Solicitor General of the United States, the Attorney General of the State of Vermont, and counsel for petitioner by depositing the same in the United States Mail on this 12th day of March, 1981.



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